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June 4, 2012

VIA MESSENGER AND EMAIL

Jeff S. Jordan
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Matter Under Review 6552

Dear Mr. Jordan:

We write on behalf of Friends of Sherrod Brown and Judith Zamore, Treasurer, (collectively, "Respondents") in response to the complaint filed by Mark Brown on or about April 11, 2012 (the "Complaint"). The Complaint fails to allege facts that constitute a violation of the Federal Election Campaign Act of 1971, as amended ("FECA") or the regulations of the Federal Election Commission (the "FEC" or "Commission") and, accordingly, should be promptly dismissed.

On March 24, 2012, U.S. Senator Sherrod Brown and Republican candidate Josh Mandel spoke at the annual meeting of the Ohio State Modior Association (the "Association"). It is Respondents' understanding that attendance at the meeting was limited to members of the Association. It is also the Respondents' understanding that it was possible to view a video of Senator Brown's and Mandel's speeches on the Association's publicly available website for some period of time. It appears that access to the video has since been restricted to the Association's members.

Based on these facts, the Complaint alleges that Respondents, as well Mandel's campaign, violated the Act in two ways: first when the candidates delivered speeches at the meeting, and second, when the video of those speeches was made available on the Association's website, both events allegedly constituting corporate in-kind contributions from the Association.

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In neither case, however, do the alleged facts, even if proven true, describe a violation. As Commission regulations expressly provide, membership organizations, such as the Association,¹ may invite candidates to address members, executive and administrative personnel (or all employees), and their families at a meeting, convention, or other function without making a contribution to the candidate.² Furthermore, under the definitions of coordinated communication and public communication, a contribution does not result from free coordinated internet activity, such as the posting of a speech on a website, unless it is posted for a fee on the website of another.³ Because the Complaint does not "allege specific facts, which, if proven true, would constitute a violation of the Act," it should be promptly dismissed.⁴

1. Respondents Did Not Accept a Contribution when Senator Brown Spoke to the Association

Under two separate regulations, a membership organization, such as the Association, may invite a candidate to address certain limited groups of individuals at organization events.⁵ First, under 11 C.F.R. §§ 114.3(a)(2) and (c)(2), a membership organization may allow a candidate to address its members, executive and administrative personnel, and their families at a meeting, convention, or other function of the corporation. Other employees who are necessary to administer the meeting; other guests who are being honored, speaking or otherwise participating; and the news media, may also be in attendance.⁶ Second, under 11 C.F.R. §§ 114.4(b)(1) and (e), a membership organization may allow a candidate to address *all* of its employees, its members, and their families at a meeting, convention, or other function, provided certain

¹ It is Respondents' understanding that the Association qualifies as a membership organization under 11 C.F.R. § 114.1(e)(1)(i)-(vi). Under its Constitution and Bylaws, which are available at <http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf>, the Association is composed of ten distinct classes of qualified members. The Association acknowledges its members as such and routinely solicits qualified individuals to join.

² 11 C.F.R. §§ 114.3(a)(2), 114.3(c)(2)(i), 114.4(b)(1), 114.4(e).

³ *Id.* §§ 100.26, 109.21.

⁴ See Statement of Reasons of Commissioners David M. Mason, Bradley A. Smith, Karl J. Sandstrom, and Scott E. Thomas, Matter Under Review 4960 (Clinton for U.S. Senate Exploratory Committee) (Dec. 21, 2000) (finding that the Commission may find reason to believe only where a complaint meets this threshold standard).

⁵ 11 C.F.R. §§ 114.3(a)(2), 114.3(c)(2)(i), 114.4(b)(1), 114.4(e).

⁶ *Id.* §§ 114.3(a)(2), 114.3(c)(2).

conditions are met. Just as under the prior provision, guests who are being honored, speaking or otherwise participating and the news media may also attend.⁷

Here, it is Respondents' understanding that the Association's annual meeting was a closed event not open to the general public, and that the attendees met the requirements of 11 C.F.R. § 114.3, and § 114.4. For that reason, the Association was squarely within its rights in inviting Senator Brown to speak and Senator Brown was squarely within his rights in accepting that invitation with no resulting contribution.

2. Respondents Did Not Accept a Contribution when the Association Posted the Speech on its Website.

The Complaint further alleges that Respondents violated the Act when the Association posted Senator Brown's speech on its website. Although complainant's theory of liability is not entirely clear, we assume here that he alleges the posted video is a coordinated communication, and thereby a contribution from the Association to Respondents.

Like the first, this theory contradicts an express regulatory allowance. Generally, an outside entity makes an in-kind contribution to a candidate if it coordinates certain types of paid "public communications" with that candidate.⁸ If the communication is not coordinated with the candidate, or if it does not constitute a "public communication," however, it will not result in a contribution to a candidate.⁹ "Public communication" is defined to exclude "communications over the Internet, except for communications placed for a fee on another person's Web site."¹⁰

Here, the Association's communication was not a "public communication." When the Association posted Senator Brown's speech, it did so as part of a posting about its meeting on its own website. Because this communication was "over the Internet" and not "placed for a fee on another person's Web site," it was not a public communication, not a coordinated communication, and thus not an in-kind contribution to Respondents. Furthermore, the Complaint does not allege that the Association and Respondents engaged in any of the "conduct" required to establish coordination under 11 C.F.R. § 109.21(d).

⁷ 11 C.F.R. §§ 114.4(b)(1), 114.4(e).

⁸ 11 C.F.R. § 109.21(b)(1) (in addition to "public communications" the coordination regulation also applies to "electioneering communications," which is not relevant here).

⁹ See 11 C.F.R. §§ 109.21(a)(1)–(3), 109.21(b)(1).

¹⁰ *Id.* §§ 100.26.

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In conclusion, doing two different things that are expressly permitted under the Act, hosting candidates at membership events and posting content on an entity's own website, cannot together constitute a violation. Thus, the Association did not make a contribution to Respondents and the Complaint should be promptly dismissed.

Very truly yours,



Marc E. Elias
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